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IN THE

Supreme Court of the United States

October Term, 1969

No. ..1509

UNITED STATES OF AMERICA,

Respondent,

against

GERALD W. ESKOW,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 30, 1970

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Reasons for Granting the Writ	3
Conclusion	11
Appendix A	1a
Appendix B	1b

Cases Cited

Carbo v. United States, 314 F. 2d 718 (CA 9)	7
Durland v. U. S., 161 U. S. 306	9
Hanley v. SEC, 415 F. 2d 589 (CA 2, 1969)	11
United States v. Antonelli Fireworks Co., 155 F. 2d 631 CA 2 (1946) cert. den. 329 U. S. 742 (1946)	8
United States v. Dennis, 183 F. 2d 231	7
United States v. Klye, 257 F. 2d 559 (CA 2, 1958)	9
United States v. Simon, Kaiser and Fishman, —— F. 2d —— 1969, cert. den. —— U. S. ——	10

PAGE

U. S. v. Dallaro, 99 Fed. 2d 783 10

Wong Sun v. United States, 371 U. S. 471, 9 L. ed. 2d 441, 83 S. Ct. 407 (1963) 7

Statutes Cited

Title 18 USC §1341 2

28 U. S. C. §1254(1) 2

Authorities Cited

Maguire and Epstein, Preliminary Questions of Fact Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392 (1927) 7

Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165, 169 (1929) 7

Schick, Judicial Relations on the Second Circuit, 1941-1951, 44 N. Y. U. L. R. 939, 960-961 (1939) 3

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The petitioner, Gerald W. Eskow, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, for the Second Circuit, affirming petitioner's conviction after a jury trial entered in the above cause on February 27, 1970.

Opinion Below

The opinion of the Court of Appeals [Lumbard and Friendly (C. J. J.) and Mansfield (D. J.)] was rendered on February 27, 1970, is not officially reported and is printed as Appendix A to this petition.

The opinion of the District Court in sentencing the petitioner is unreported and is printed as Appendix B to this petition.

Jurisdiction

The judgment of the Court of Appeals was rendered on February 27, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Whether the conditional admission of highly prejudicial and incompetent evidence, namely, evidence of conversations and transactions had by a co-defendant outside of the presence of the petitioner, constituted harmless error when the Trial Court incorrectly permitted the jury to decide, on the basis of hearsay evidence, the crucial preliminary issue of whether there was proof, *prima facie*, of a common scheme between petitioner and the co-defendant.

2. Whether a businessman was justly convicted of a crime of mailing fraudulent financial statements when he sought and relied upon the advice and guidance of experts—both counsel and independent auditors.

Statement

Petitioner and Fred H. Mackensen ("Mackensen") were indicted under Section 1341 of Title 18 U. S. C. The indictment embraced 43 counts of which the first forty counts of the indictment charged the petitioner with forty separate mail fraud violations (Title 18 USC §1341).

The charges involve the mailing of certain financial statements of Yale Express System, Inc. ("Yale") and its subsidiaries, dated December 31, 1963, June 30, 1964 and September 30, 1964, to eight named insurance company investors in implementation of an alleged common scheme and artifice to defraud them. More specifically,

the indictment charged that the eight lenders were solicited and induced by Mackensen and petitioner to purchase, collectively, on September 30, 1964, $2,350,000 of promissory notes of Yale in reliance upon the financial statements of Yale and its subsidiaries for the year ended December 31, 1963 and for the six months period ended June 30, 1964, coupled with an undertaking to supply subsequent quarterly financial statements, and by the circulation of a false financial statement for the nine months ended September 30, 1964.

After a lengthy jury trial before Hon. John M. Cannella, District Judge, the petitioner was convicted on 38 counts and was sentenced to be confined for a period of one year on each of the counts, one through five inclusive, seven through sixteen inclusive and twenty-five through forty inclusive, to run concurrently with each other, the execution of prison sentence being suspended. The judgment of conviction was thereafter affirmed by the Court of Appeals for the Second Circuit.

Reasons for Granting the Writ

1. A decision by this Court will not only repair a plain miscarriage of justice but will settle definitely the scope and ambit of the "harmless error" rule which, despite the clear lessons of decisions by this Court, has been repeatedly misread or incorrectly applied [Schick, *Judicial Relations on the Second Circuit, 1941-1951,* 44 N. Y. U. L. R. 939, 960-961 (1969)].

That there was an egregious injustice done to an innocent man was acknowledged by the Trial Judge who characterized petitioner as a "whipping boy" (14b)*. Notwith-

* Citations to the opinions below are designated by page references followed by a or b and refer to the appendices to this Petition. Record references are to the document number, *e.g.*, T. refers to trial transcript page, Ex. refers to exhibit.

standing the finding by the Court of Appeals that petitioner made "conscientious efforts . . . to get at the facts, including his initiation of studies that led to the discovery of some of the major [accounting] errors, his repeated requests for more studies and findings and his confusion at the quixotic and apparently inconsistent conduct of" (6b) the auditors and his comptroller (whose testimony on behalf of the Government convicted petitioner), petitioner was chargeable with knowledge of the falsity of the financial statements.

Petitioner's conviction is ineluctably traceable to the error of the Trial Judge in permitting the jury to determine the threshold issue of a common scheme and he compounded his error by allowing the jury to rest its determination upon concededly incompetent evidence. This error was not and could not have been cured (as the Court of Appeals suggests) by the Trial Court's charge (18a).

While we do not quarrel with the statement of facts set forth in the opinion of the Court of Appeals, it omits relevant facts which would have exculpated petitioner if the Trial Judge had not abdicated his responsibilities to the jury.

The evidence shows, first, that the petitioner relied exclusively upon his internal accounting staff and upon Peat, Marwick, Mitchell & Co. ("PMM") to prepare and publish financial figures and it was conceded by all witnesses that petitioner gave Robert Conroy ("Conroy"), a partner in Yale's auditing firm, Peat, Marwick, Mitchell & Co. ("PMM"), a completely free hand and placed no limitations upon the scope of any audit or the time and money to be expended by PMM for audits and special studies.

Second, omitted from the statement by the Court of Appeals was the admission by PMM auditors, called by the Government as its witnesses that between January 1, 1964

and July 22, 1964, PMM had discovered certain omissions and underaccruals which demonstrated that the annual report for the year 1963 (which it had certified) was inaccurate by approximately $1,600,000. Third, no one testified that these errors and omissions, known to PMM, were called to petitioner's attention nor could they have been, for on July 22, 1964, PMM sent a so-called management letter to the petitioner (*Eskow's Exhibit "V"*) which made no reference at all to any underaccruals, double reversal unreported bills, inadequate banks reconciliations or to any other variations in volume of business or profits in the first quarter of 1964 or for the year 1963. Indeed, the only accounting error noted in the PMM letter referred to an error of $2,000 in CODs (Tr. 2870-74). That this concealment by PMM was deliberate and calculated is evidenced by the fact that PMM never made a single effort to withdraw its 1963 certification or to report the errors to the Securities and Exchange Commission, the Interstate Commerce Commission or the New York Stock Exchange. Moreover, the very statements upon which petitioner was convicted were supplied to the Interstate Commerce Commission under oath, certifying their accuracy, by the Government's principal witness, Donald Palmer ("Palmer"). Two sworn reports were filed by Palmer despite the fact that he and Conroy allegedly called to petitioner's attention various errors in the books and records and financial statements of Yale. Palmer also confirmed that petitioner never advised, directed or instructed him to file these or any other reports (Tr. 3486). Palmer admitted, too, that petitioner never asked him to sign anything or to prepare or alter any figures. On the contrary, he affirmed that petitioner gave him a free hand and asked him to do whatever was necessary to develop correct figures (Tr. 2374).

All of this evidence, favorable to the petitioner, was vitiated by the erroneous admission into evidence of the

most damaging kind of double and triple hearsay. To weigh the impact of this error, it must be noted that the thrust of the Government's case was to attribute to petitioner the conduct of Mackensen in allegedly falsifying earnings figures. Illustrative was the testimony of one Goldberg (A) about a conversation with one Goldwasser (B) concerning instructions allegedly given to the latter by Mackensen (C) to create a fictitious profit and to distort certain accruals. To begin with, the conversations occurred in 1963, before the date alleged in the indictment as the commencement of the alleged common scheme. Nevertheless, the Trial Court allowed the testimony over objection:

> "The Court: Subject to the connection that I indicated before when the witness was testifying that this was told to him by Goldwasser, because otherwise——
>
> Mr. Griffin: There is a further 'subject' we want. There is absolutely no proof of any common scheme or artifice in this case.
>
> The Court: *The jury will have to determine it,* I can't determine that as a law fact." (Emphasis supplied) (T. 1612).

Again, when petitioner moved to strike palpably inadmissible testimony and exhibits because no connection had been shown (T. 3236), the Court replied:

> "The Court: Well, I find in this area that *the jury could find that there was a connection* and it is denied with an exception to the defendant." (Emphasis supplied) (T. 3236).

The preliminary question of fact, i.e., the existence of the common scheme was for the Judge, and not the jury, to decide.

It is a fundamental rule that an offer in evidence of statements made outside the presence of the defendant poses a question of competency and the admissibility thereof must be determined by the trial court and not by the jury. [*Wong Sun* v. *United States*, 371 U. S. 471, 9 L ed. 2d 441, 83 S. Ct. 407 (1963)]; *Carbo* v. *United States*, 314 F. 2d 718 (CA 9); *United States* v. *Dennis, supra*, 183 F. 2d at page 231; Maguire and Epstein, *Preliminary Questions of Fact Determining the Admissibility of Evidence*, 40 Harv. L. Rev. 392 (1927); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165, 169 (1929) and cases cited in fn. 24.

Despite this, the Court of Appeals treated these errors as "harmless" and erroneously concluded that there was "independent proof to permit the jury's consideration of evidence received 'subject to connection'" (18a). The fact is that the case against petitioner was a monumental composite of double and triple hearsay, innuendo and accusations substituted for fact. The so-called "independent proof" was meaningless unless read in the context of the inadmissible evidence which cruelly identified petitioner with events and conversations outside his presence and which occurred without his participation or knowledge.

It was for the Trial Court to have initially determined that there was evidence of a common scheme and it was for the Trial Court to have determined that there was a connection between the plainly incompetent testimony and the evidence of a common scheme. Until that initial ruling was made by the Trial Judge, the conversations were not admissible into evidence and if conditionally admitted, should have been stricken with appropriate instructions to the jury. To believe that the jury could have sifted the evidence so that its decision was not colored by prejudicial and inflammatory testimony admitted "subject" to a connection which the Trial Judge incorrectly instructed

the jury to find is to indulge in a fantasy which not even the most passionate proponent of the jury system shares. This was not a harmless error [*United States* v. *Antonelli Fireworks Co.*, 155 F. 2d, 631 CA 2 (1946) cert. den. 329 U. S. 742 (1946)]. What the Trial Judge did, and the Court of Appeals condoned, was to leave with the jury damaging testimony concerning Mackensen and an instruction that this evidence could be used by them to find a common scheme and then, as part of a wicked syllogism, to attribute Mackensen's conduct to the petitioner.

2. A decision by this Court will settle the responsibility of independent auditors in the release of financial statements of the modern corporation.

While the Court of Appeals recognized the culpable negligence of PMM and the Trial Court understandably questioned why PMM had not been the real defendants in the trial (13b), they imposed upon the petitioner a responsibilty which no officer of a corporation whose operations are complex and widespread can conceivably assume or discharge. To be sure, petitioner was concerned about the correctness of the financial statements issued by Yale. But this did not connote guilty knowledge. Conroy of PMM testified as to petitioner:

> "Q. Isn't it a fact that he said to you, in words or substance, 'Bob, I want to get all the facts and spend whatever money has to be spent. Hire as many people as you need, but get me the facts'. A. That is correct.
>
> Q. Did he cooperate fully with you? A. Yes.
>
> Q. Did he ever restrict your access to the books and records? A. No.
>
> Q. Did he ever refuse to answer any questions put to him? A. No" (T. 3060).

A critical finding by the Court of Appeals was that the petitioner permitted the release of a profit figure of $717,000 when, in fact, Yale had sustained a loss of $1,000,000. Here, too, Conroy admitted that petitioner was willing to release the loss figures but, acting for PMM, Conroy directed him not to and conceded that the release of $717,000 earnings statement was a product of a consensus in which Conroy, acting for PMM, and Palmer concurred (4b).

The fact is that petitioner repeatedly offered to release any figures which PMM and Palmer produced, even if they showed gigantic losses, but PMM repeatedly instructed petitioner not to do so (4b). It is small wonder that the Trial Court commented:

> ". . . it certainly seems to me that for a man like Conroy to get up and say that 'we submitted this report' and that the man should know in September of 1964 that this was false and then they themselves did nothing about it. *Here is the company that certified the report to the public in September 1964, when they made the loan, and they continued and left their certification there.*
>
> What kind of ignorance is this? *Why aren't they in the case and why shouldn't they be part of the defendants* and to defend their conduct in this court of action?" (Emphasis supplied) (13b).

Petitioner may have been naive and trusting but this is not the equivalent of guilty knowledge and criminal intent [*United States* v. *Klye*, 257 F. 2d 559 (CA 2, 1958)].

As Mr. Justice Brewer said in *Durland* v. *U. S.* (161 U. S. 306, 314), if one enters into a transaction in good faith believing that it is in the best interests of the company, the fact that he was wrong or "visionary" does not imply or suggest guilty intent.

Virtually every Government witness testified that he knew that petitioner was not an accountant and that petitoner had nothing whatever to do with Yale's financing programs. The loan transaction, which is the basis of the alleged common scheme, was negotiated by Eastman Dillon (the second largest underwriting firm in the world), by Yale's general counsel and Mackensen.

At worst, petitioner could have been charged with inaction but as Judge Learned Hand said in *U. S.* v. *Dallaro* (99 Fed. 2d at p. 783), inaction may be acquiescence but acquiescence is passive and one cannot become a party to a crime unless he affirmatively unites himself with the venture and affirmatively agrees to take a part in it. There was not a scintilla of proof that petitioner joined any plan, scheme or artifice to defraud or that he affirmatively agreed to take part in it.

Unless businessmen can rely upon independent auditors, there is no way in which reports required by the Government and investors can be safely issued. Every accounting statement mailed under the signature of an officer of a company is or becomes a trap for the innocent as well as the guilty. In *United States* v. *Simon, Kaiser and Fishman* (—— F. 2d —— 1969, cert. den. —— U. S. ——), the Court of Appeals adumbrated the responsibilities imposed upon an accountant when he has reason to believe that "the affairs of the corporation are [not] being honestly conducted". That duty is heightened when the "dishonesty he has discovered is not some minor peccadillo but a diversion so large as to imperil if not destroy the very solvency of the enterprise". In this case, PMM did nothing to prevent the distribution of financial statements which the Court of Appeals concluded were plainly false and whose falsity was exposed by the audits made by PMM. It is clear beyond peradventure that PMM knew that the challenged financial statements were false

but Conroy admitted that he was part of a consensus to release the profit figure which was later demonstrated to be false. This was not a judgment made by the petitioner.

The sad fact is that petitioner was the sacrificial lamb to expiate the grossly negligent conduct of PMM. This case, therefore, presents a unique opportunity for this Court to (a) define the "harmless error" doctrine and (b) describe the responsibilities of officers and independent auditors to the investing public. At the very least, a rule of public responsibility derived from the Securities Act of 1933, as amended, should be adopted [*Hanley* v. *SEC*, 415 F. 2d 589 (CA 2, 1969)]. Where, as in the case at bar, independent auditors certify as to the accuracy of financial statements, a "special relationship" is established which creates, at the minimum, an implied warranty that the auditors had an adequate and reasonable basis for their opinion.

CONCLUSION

Petitioner was denied, and was deprived of, a fair trial when the Trial Judge delegated to a jury the resolution of issues which is the exclusive function of the Court. Petitioner is the victim of an injustice which can be repaired only if this petition is granted.

Respectfully submitted

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APPENDIX A

Opinion of the Court of Appeals, February 27, 1970

MANSFIELD, District Judge

On November 5, 1968, following a four-week jury trial, defendants Gerald W. Eskow and Fred H. Mackensen were found guilty of using the mails in furtherance of a scheme to defraud eight insurance companies in connection with loans totalling some $2,350,000 to Yale Express Systems, Inc. ("Yale" herein) in violation of Title 18 U. S. Code §§1341 and 2, as charged in 31 counts of a 43-count indictment.[1] They here urge that the judgments of conviction entered on December 27, 1968 be reversed on the grounds that (1) the indictment was defective; (2) there was a fatal variance between the indictment and proof; (3) the evidence of fraudulent intent and a common scheme was insufficient; (4) the trial court, after admitting certain evidence "subject to connection," improperly permitted the jury to determine whether the necessary connection had been established; (5) the trial court erred in characterizing credibility as a collateral matter and foreclosing cross-examination on certain matters. For the reasons hereinafter stated we affirm.

The mail fraud charges grow out of defendants' involvement in obtaining loans in 1964 for Yale, of which Eskow was president and Mackensen was the administrative vice-president in charge of the company's accounting department. Yale was both a holding and operating company. Prior to 1963 it had two wholly-owned subsidiaries, Yale

[1] Defendants were convicted on Counts 1 through 5, 7 through 16, and 25 through 40. The remaining counts, some of which also named Norman Goldwasser as a defendant, were severed except for Count 6, which was dismissed.

Appendix A

Transport, which conducted interstate motor carrier operations, and American Freight Forwarding Corp., the name of which denotes its business. On May 1, 1963, Yale purchased 97% of the issued stock of Republic Carloading and Distributing Company ("Republic" herein), also a freight forwarder.

In March, 1964, Yale commenced negotiations through Eastman Dillon Union Securities Co. ("Eastman Dillon" herein) to borrow money and in that connection furnished to Eastman Dillon its financial statements for 1963 and also apparently for the first quarter of 1964. Eastman Dillon, in turn, forwarded these statements to prospective lenders.

Eastman Dillon was successful in securing loans totalling $2,350,000 from eight insurance companies. In the loan agreements, which were closed on September 30, 1964, Yale warranted that: (1) the financial statements covering its operations for 1963 and the first six months of 1964 (apparently not sent to the lenders) were accurate and fairly presented the financial condition of the company for the periods stated, (2) generally accepted accounting principles had been utilized in preparing the statements, (3) there had been no material changes after June 30, 1964, that would adversely affect the two financial reports, (4) nothing material had been omitted and there were no known facts that might adversely affect the future financial condition of the company.

Eskow and Mackensen made similar representations in certificates signed on September 30, 1964, the day the loan was closed. Each warranted that to his knowledge the financial statements covering 1963 and the first six months of 1964 were true, and that neither knew of anything

which might have an adverse effect on the financial condition of the company as presented in the financial statements. In November, 1964, pursuant to defendants' authorization, Yale sent another financial statement to the lenders setting forth its operations for the first nine months of 1964 as required by the loan agreements.

The 1963 financial report showed a profit for that year of $1.8 million. The report for the first six months of 1964 showed a profit of $717,000. The nine-month report set the profit at $1.5 million. All of these profit figures were materially false. A reaudit done in 1965 disclosed that instead of realizing a profit in the sum of $1.8 million for the year 1963 the company had lost $1.8 million, and that it had also lost over $5 million for the year 1964. Although no precise breakdown of the loss figures for the first six and nine-month periods of 1964 was made, a preliminary audit done by Peat, Marwick, Mitchell & Co. ("PMM" herein), independent certified public accountants, showed a six-month loss of approximately $1.5 million and a nine-month loss of approximately $1.8 million.

The gross disparity between the profit announced for the year 1963 and the loss actually sustained that year resulted largely from the omission from the 1963 financial statement of a number of substantial expenses, most of which had been incurred by Republic. As a freight forwarder Republic's principal expense was the employment of motor and rail carriers to move the freight which it had collected and consolidated. Because the carriers usually delayed submission of their bills for such transportation expenses, Republic had followed the procedure of accruing the expenses monthly on the basis of experience and then, upon later receiving the bills, allocating the actual expense back to the month in which the expense had been incurred. This

adjustment of accrued to actual expense was accomplished through use of a coding system. Although an under-accrual of expenses for any month could temporarily result in an overstatement of profits for that month, a downward adjustment would be made when the actual expenses were coded.

In December, 1963, Mackensen took steps that drastically changed the foregoing system. First he instructed Irving Goldberg, the chief accountant of Republic, to make an arbitrary reduction of almost $470,000 in the transportation accrual expenses for October and November. At the same time he converted Republic to a modified cash basis of accounting, described as a "fast cut-off" method, under which a date two weeks after the end of each month was fixed as the time for cutting off expenses related to that month, even though many bills for transportation expense were not usually received until much later. Simultaneously Mackensen eliminated the system of coding actual transportation expenses, thus making it impossible to allocate actual expenses, upon later receipt of invoices, back to the month in which they had been incurred so as to determine the actual profit for that month.

The arbitrary $470,000 reduction in transportation expenses, coupled with the switch-over in accounting procedure toward the end of the year, was later shown to have been the cause, in very substantial measure, of the large overstatement of income for 1963. The figure was further overstated by the fact that in 1963 the Yale Transport terminal in Newark had incurred $438,000 in bills which had not been included at all in Yale's accounts. These invoices were discovered in early August, 1964, in a shoe box in the custody of Norman Goldwasser, chief accounting officer for Yale Transport. Mackensen thereupon directed that they be suppressed, resulting in an additional

understatement of expenses for 1963 by approximately $400,000. Lastly, there was proof that the 1963 earnings were further inflated by the failure of Yale to write off at least a substantial part of some $791,000 in accounts receivable which had become uncollectible by 1963.

The gap of more than $2 million between the profit of $717,000 shown by Yale for the first six months of 1964 and the loss of $1.5 million sustained for the same period and the even greater discrepancy of over $3 million between the $1.5 million profit as against the $1.8 million loss for the first nine months, is attributable in large part to a few major and egregious misstatements made at Mackensen's direction. The first of these occurred in April 1964, when a draft profit and loss statement for the first three months of 1964, prepared by Goldwasser, indicated a loss for the period of almost $600,000. Mackensen thereupon created a false profit of $273,000 for the quarter by arbitrarily eliminating $600,000 in expenses of Republic and failing to reduce Yale Transport's revenue by $440,000 owed to interline carriers. Another major falsification occurred in June, 1964, when Mackensen directed Goldwasser, who was preparing the monthly financial reports for May, 1964, to credit the company twice for $403,000 in freight revenue that had been received only once. The two items alone—the arbitrary $600,000 reduction of expenses and the $403,000 double-counting of revenue—falsely inflated the company's six-month and nine-month statements by over $1 million.

I.

The Indictment

Defendants' attack upon the indictment is too insubstantial to require any extended discussion. The allegations,

which describe the scheme generally, set forth the essential elements of the violation of 18 U. S. C. §§1341 and 2 sought to be charged, as required by Rule 7(c), F. R. Cr. P. As amplified by a series of bills of particulars the indictment was plainly sufficient to inform the defendants of the charge agianst them, to enable them to prepare for trial, and to preclude double jeopardy. *United States* v. *Debrow*, 346 U. S. 374, 376 (1953); *United States* v. *Spada*, 331 F. 2d 995, 996 (2d Cir.), *cert. denied*, 379 U. S. 865 (1964); *United States* v. *Cimino*, 321 F. 2d 509, 512 (2d Cir. 1963), *cert. denied sub nom. D'Ercole* v. *United States*, 375 U. S. 967 (1964). Since each mailing pursuant to an alleged scheme to defraud constitutes a separate offense, *Badders* v. *United States*, 240 U. S. 391, 393 (1916); *Hanrahan* v. *United States*, 348 F. 2d 363, 366 (D. C. Cir. 1965), *cert. denied*, 389 U. S. 845 (1967), the indictment is not vulnerable to a claim of multiplicity.

Defendants' contention that the indictment was restricted to charging a scheme consisting of the mailing of false financial statements of Yale, as distinguished from Yale and its subsidiaries, ignores the plain and unequivocal language of the indictment itself which repeatedly charges that as "part of the said scheme and artifice to defraud" the defendants prepared and mailed false statements purporting "to reflect the financial condition of Yale and its subsidiaries". Although Paragraph 1 charges that the scheme was to obtain money by false pretenses from insurance companies who were induced to purchase "Yale's promissory notes" on the defendants' false representations as to the soundness of "Yale," an essential part of the alleged scheme was the use of the false financial statements of Yale and its subsidiaries. Indeed, the allegation of inducement, although relevant, was not an essential element of the crime. The Government was not required to allege

or prove that the fraud was successful. *United States* v. *Rowe*, 56 F. 2d 747 (2d Cir.), *cert. denied*, 286 U. S. 554 (1932). It is sufficient to allege and prove a scheme or artifice to defraud coupled with the requisite mailing. *United States* v. *Fromen*, 265 F. 2d 702, 705 (2d Cir.), *cert. denied*, 360 U. S. 909 (1959).

II.

Sufficiency of the Evidence of Fraudulent Intent and a Common Scheme

Eskow and Mackensen each assert that the release of the two financial reports (for 1963 and the first six months of 1964, respectively) was not fraudulent, although admittedly perhaps negligent, because each accepted the statements as prepared by the company's internal accounting staff and reviewed by PMM. In support of their contention they rely on certain portions of the record but ignore damaging proof found elsewhere. The jury, of course, was not required to limit itself to the evidence relied upon by appellants and, because of the verdict below, the evidence must here be assessed in the light most favorable to the Government, *United States* v. *Littman*, Dkt. No. 33682, Slip Opin. at 1095 (2d Cir., Jan. 21, 1970); *United States* v. *Andreadis*, 366 F. 2d 423 (2d Cir. 1966), *cert. denied*, 385 U. S. 1001 (1967); *United States* v. *Dardi*, 330 F. 2d 316, 325 (2d Cir.), *cert. denied*, 379 U. S. 845 (1964), and all permissible inferences are to be construed in the Government's favor. *United States* v. *Marshisio*, 344 F. 2d 653, 662 (2d Cir. 1965); *United States* v. *Dardi*, *supra* at 325. According to this standard of review the evidence against Eskow and Mackensen is sufficient to support the jury's verdict.

Appendix A

At the outset we recognize, as Eskow urges, that, unlike Mackensen, he was not directly in charge of Yale's accounting activities, and that he may not have been able to grasp all of the fined nuances of some of the financial data before him or to decide, as between conflicting figures, which was right and which was wrong. On the other hand he was no simpleton. He had commenced work with the company in 1938 and by 1963 had risen to the position of president.[2] Yale was a corporation that had been controlled by the Eskow family throughout its existence; even after it went public in 1960, the Eskow family owned 80% of its outstanding stock. Eskow therefore had a strong motive to follow the company's finances very closely and to scrutinize them with care. The record reveals that he did so, not only during the crucial year 1964 but at an earlier period, before he was confronted with the false statements used in 1964. Between July and October, 1963, for instance, he was sufficiently knowledgeable concerning the accounting entry of purchased transportation expense to advise Goldberg that his transportation expense accruals as shown on the monthly statements of Republic were too high. In October, 1963, he issued a prediction to the effect that the combined profit of Yale and Republic for the year 1963 would be about $4 million or $1.00 per share. Thus, as the company's chief executive officer, he did not hesitate to become intimately involved, as well as he should, in the company's financial affairs.

Conceding such involvement, Eskow contends that the evidence merely shows that upon being faced with conflicting views of differing experts, which disturbed and

[2] He had taken business courses at N.Y.U. for two years, and had worked his way up within the company, holding jobs as billing clerk, dispatcher, receiving clerk, driver and the like.

perplexed him, he did everything that could be reasonably expected of him, ordering additional studies, seeking to induce the accountants to reconcile their differences, and finally making a good faith though erroneous decision to release figures that turned out to be wrong. Although it is true that he did these things, the record before us contains ample evidence to justify a different view. It reveals that Eskow was made aware of misstatements of such magnitude that the jury was warranted in concluding that he acted with fraudulent intent and in collaboration with Mackensen when he authorized the release of the financial reports.

The major fraudulent items were brought to Eskow's attention my PMM in a series of meetings in the spring and summer of 1964. As outside auditors, PMM had performed the annual audit of the company since 1960. Robert G. Conroy was the partner in charge, Donald Adams the audit supervisor, Robert Lee the senior accountant assigned to the Yale Transport portion of the audit and Robert Whelan the senior accountant similarly assigned to the Republic portion. Working under them were up to 10 senior and junior accountants.

PMM completed its audit of the year 1963 in March of 1964. It certified that Yale's profits for 1963 were $1.8 million. Eskow was distressed by this figure, which was substantially under the $4 million he had announced publicly as the company's projected profit. He asked PMM to review the company's internal accounting procedures to determine whether they had contributed to the low profit figure. In the course of this review PMM uncovered the various improper accounting techniques and entries which it had failed to notice in its audit of the financial reports prepared by Yale's internal accounting department. On

Appendix A

May 8, 1964, Conroy and Adams informed Eskow that they considered the company's published report of income for the year 1963, and the proposed report of a $273,000 profit for the first quarter of 1964, to be "misleading." They further advised him that they were particularly troubled by the conflicting reports by the company's own accounting department, one of which had indicated a loss of $600,000 for the first quarter and was then later revised to show a $273,000 profit by means of questionable adjustments. Eskow reacted by adopting a course he was repeatedly to follow thereafter when confronted with bad news. He asked that additional analyses be made.

At a directors' meeting attended by Eskow and Mackensen on May 14, 1964, Goldberg challenged the elimination of $600,000 from Republic's expenses (for the first quarter of 1964) which had been arbitrarily ordered by Mackensen without any justification. He advised Eskow that the $600,000 deduction was an "improper" one and pointed out that as a result of the company's shifting to the "fast cut-off" method of accounting just before the end of 1963, and its elimination of coding of invoices, all at Mackensen's orders, he believed that the company's liabilities had been "grossly understated." Mackensen testified that following the meeting he had a private conversation with Eskow in an automobile in which he told Eskow that failure either to accept the corrections or to economize could result in the distortion by the published earnings reports of the company's actual earnings. Mackensen conceded that he made the same statement to Eskow again on September 21, 1964, nine days before the loans were consummated.

On May 25, 1964, Conroy of PMM met with Eskow and his special assistant Kenneth Seidel, whom Eskow

described as his "eyes and ears," observing that "anything told to Kenny Seidel is similar to telling it to him [Eskow]." Conroy reviewed the substance of an analysis made by himself and Adams which showed that the company had suffered a loss of $1,036,000 during the first quarter of 1964 instead of realizing the profit of $273,000 which had been reported on the books of the company. Regardless of other items that might have been distorted, such as the probable understatement of transportation expenses as a result of the newly adopted "fast cut-off" method of accounting, Conroy noted that no justification had been put forth for the arbitrary elimination of $600,000 in expenses for the first quarter. This item, standing alone, erased any profit for that quarter. It would have required no training as an accountant for Eskow to have recognized the importance of the item and to have had it verified in short order. Yet he took no action to curtail release of the $273,000 profit figure, which was later sent to the prospective lenders.[3]

Obviously troubled by these revelations Eskow on May 25, 1964, asked PMM to make a special study of the operating figures, reinstating the coding system by which bills could be allocated back to the periods during which the expenses were actually incurred. This study was begun immediately and completed by PMM on July 15, 1964, with the aid of some 75 college students who per-

[3] Although the indictment does not specifically refer to the first quarter 1964 financial statement, evidence as to Eskow's knowledge of its material falsity was relevant to the charge that the defendants prepared a false statement for the six-month period ending June 30, 1964. The same substantial falsely-stated items form the basis of both. Furthermore, the Government in its bill of particulars advised that the term "other false documents" in Paragraph 4 of the indictment embraced the statement for the first quarter of 1964.

formed the mechanical work of allocating the expenses under PMM's supervision. It indicated that the company's 1963 expenses had been understated by approximately $1.6 million. This information was conveyed to Seidel. Since Eskow and Seidel had followed the study closely as it progressed, personally interviewing accountants about three times a week, and Seidel was considered by Eskow to be his "eyes and ears," the jury could reasonably infer that Seidel informed Eskow of the results of the study. However, PMM apparently neither submitted a written report nor made any firm recommendations to Eskow.

On July 20, 1964, Yale hired as comptroller Donald Palmer, a former PMM accountant with three years' experience in the trucking industry. On August 2, 1964, Palmer discovered the "shoe box" bills amounting to $438,000, $400,000 representing expenses incurred in 1963, which Mackensen had ordered to be kept off the books for that year. Palmer also uncovered in short order that there had been a double-counting of $403,000 revenue-in-transit in May, 1964, that $600,000 of accrued transportation expenses of Republic for the first quarter of 1964 had been improperly eliminated, and that the 1963 report carried as income $791,000 in accounts receivable that were probably uncollectible. In a three-hour meeting on August 7, 1964, Palmer told Eskow and Seidel of his findings. They discussed the possibility of having to restate the company's 1963 earnings. The meeting ended with Eskow directing Palmer and PMM to determine by August 13, 1964, what effect the discrepancies disclosed by Palmer would have on the profit figure which Yale proposed to release for the first six months of 1964. The company's internal accounting department had just completed a first

draft of the final report for the latter period which showed a profit of $717,000.

Faced with the necessity of filing a six months financial report with the New York Stock Exchange and Interstate Commerce Commission on August 14, 1964, Eskow met on August 13 with Conroy, Palmer and various officers and directors of the company to decide whether or not he should release the $717,000 profit figure shown by the company's internal accounting department for the first six months of 1964. Conroy and Palmer told him that the $717,000 figure was incorrect. They presented their own preliminary profit and loss statement, giving a copy to Eskow, which showed that the company had lost $1,012,000 during the first six months. They conceded that their figures were not final and complete and that further refinements would be required, but pointed out that there was no question about some of the major errors in the company's internal report, including those arising out of the $438,000 in "shoe box" bills, the $403,000 in double-counted revenue, and the arbitrary elimination of certain accounts payable. Although Mackensen attacked their report in other respects and questioned the qualifications of Conroy and Palmer, no one disputed these three major errors which would have drastically reduced the profit shown for 1963 and eliminated altogether the profit for the first six months of 1964. Furthermore, nothing but generalities were put forth by Eskow, Mackensen or anyone else to offset these major errors.

Thus, aware that the profit figure of $717,000 for the first six months of 1964 was false, Eskow nevertheless authorized its release on August 14, 1964. Recognizing the misleading nature of the figures being released, he simultaneously joined in authorizing Palmer to maintain

two sets of books: an official set forming the basis of the profit figure and a second set known as "memo ledgers" which showed the loss based upon the findings of PMM and Palmer.

Following the August 14 release of the six months report, the evidence confirming the PMM analysis continued to accumulate. On August 25, 1964, Conroy presented to Eskow a more complete report showing that the Company had lost $1,615,000 for the first six months, as refined by the inclusion of later expenses. However, these figures were not represented to be final, and for reasons that are unclear he never prepared a final report for the six months period.

On September 30, 1964, Eskow joined Mackensen in warranting to the lenders that the published 1963 financial statement, which showed a profit of $1.8 million, and the published statement for the first six months of 1964, which showed a profit of $717,000, were accurate and that there had been no adverse change and nothing known that would materially affect the financial condition of the company. On November 13, 1964, Yale forwarded to the lenders reports which showed a profit of $1.5 million for the first nine months of 1964 even though both Eskow and Seidel were advised during the same month that the "memo ledgers" kept by Palmer indicated a loss of $1.8 million for the same period.

The foregoing facts entitled the jury to conclude beyond a reasonable doubt that Eskow was repeatedly made aware that the financial reports released for use in connection with the loans did not fairly present the results of operations for the periods involved. Admittedly the record reveals conscientious efforts on Eskow's part to get at the facts, including his initiation of studies that led

to discovery of some of the major errors, his repeated requests for more studies and findings, and his confusion at the quixotic and apparently inconsistent conduct of PMM, Conroy and Palmer.

Although the conduct of PMM and Palmer is not to be condoned, it does not excuse Eskow.[4] Given the quantum and significance of the material errors disclosed to Eskow by Palmer, PMM and others, and that their nature could easily be grasped without any expertise in accounting, the jury was justified in concluding beyond a reasonable doubt that Eskow knew the financial reports for 1963 and the first six and nine months of 1964 to be false, and that in collaboration with Mackensen he acted with fraudulent intent. The same can be said of his authorization of the release on November 14, 1964, of the statement to the effect that the company had earned a profit of $1.5 million during the first nine months of 1964 after Palmer and PMM had estimated that it had in fact lost approximately $1.8 million during the same period.

Mackensen

The evidence against Mackensen is so overwhelming that no detailed analysis is required. As the administrative vice-president in charge of Yale's accounting department, he was the principal architect of the manipulations forming the basis of the fraudulent scheme. As a first step he reduced Republic's transportation accruals for October and November 1963 by almost $470,000. He then shifted the accounting procedures to the "fast cut-off" technique, which eliminated the coding of expenses and thus made it more difficult to compare actual expenses

[4] In the case of Palmer, for instance, the jury may well have concluded that as a recently-employed company subaltern he was shaping the figures to comport with the desires of Eskow and Mackensen:

against inadequate accruals. It was he who without justification improperly eliminated $600,000 in expenses for the first quarter of 1964 in order to show a profit for that quarter. Thereafter, upon discovery of the "shoe box" bills which would have reduced the company's 1963 profit by $400,000, he ordered them kept off the books. In May, 1964, he created $403,000 in fictitious revenue by permitting revenue-in-transit to be double-counted rather than directing the adjustment that would reverse the prior period's accrual to be made.

The evidence of his involvement fully justified a jury determination that he acted fraudulently and in concert with Eskow.

Counts 33-40

Counts 33 through 40 of the indictment charge that in furtherance of the alleged fraudulent scheme defendants, on November 13, 1964, caused Yale's financial report for the first nine months of 1964 to be mailed to the lenders. Since November 13, 1964, postdated the loans, which were consummated on September 30, 1964, defendants contend that even assuming an earlier mail fraud the evidence failed to support the charges of mail fraud at the later date, since the fraud had by that time been accomplished.

The argument ignores the lenders' retention of the power to rescind the loans and demand immediate repayment, if any representation or warranty previously made should prove false or incorrect. The loan agreement further obligated Yale to furnish a nine-month statement as of September 30, 1964. The jury could well have concluded that the scheme to defraud contemplated not only the receipt of the funds but the retention of the money over the loan period, and that the false nine-month state-

ment was later mailed to prevent the lenders from exercising their power to rescind, and thus to lull them into inaction. *United States* v. *Sampson,* 371 U. S. 75, 81 (1962); *Sparrow* v. *United States,* 402 F. 2d 826, 829 (10th Cir. 1968); *Bliss* v. *United States,* 354 F. 2d 456, 457 (8th Cir.), *cert. denied,* 384 U. S. 963 (1966); *Butler* v. *United States,* 317 F. 2d 249, 255-56 (8th Cir.), *cert. denied sub nom. Benedec* v. *United States,* 375 U. S. 836 (1963); *Cacy* v. *United States,* 298 F. 2d 227, 230 (9th Cir. 1961); *Marshall* v. *United States,* 146 F. 2d 618, 621 (9th Cir. 1944).

III.

THE CONDUCT OF THE TRIAL

The trial court admitted "subject to connection" against each defendant hearsay testimony concerning conversations and transactions in which the other defendant only was involved. Each now contends that the court improperly permitted the jury to determine whether the connection had been shown.

We have repeatedly emphasized that it is for the court rather than the jury to make the initial determination of a preliminary issue upon which competency of evidence depends. *United States* v. *Geaney,* 417 F. 2d 1116, 1120 (2d Cir. 1969); *United States* v. *Dennis,* 183 F. 2d 201 (2d Cir. 1950), *aff'd,* 341 U. S. 494 (1951), *rehearing denied,* 342 U. S. 842 (1951), 355 U. S. 936 (1958); *United States* v. *Ragland,* 375 F. 2d 471, 478-79 (2d Cir. 1967), *cert. denied,* 390 U. S. 925 (1968); *United States* v. *Stromberg,* 268 F. 2d 256, 266 (2d Cir.), *cert. denied sub nom. Lessa* v. *United States,* 361 U. S. 863 (1959); *United States* v. *Nuccio,* 373 F. 2d 168, 173 (2d Cir.), *cert. denied,* 387 U. S. 906, *rehearing denied,* 389 U. S. 889 (1967). In this

case that determination was whether a common scheme or plan was sufficiently established by independent proof to permit the jury's consideration of evidence received "subject to connection". There can be no doubt that the jury had before it binding proof from which it could find the common scheme that was charged.

Although the trial judge initially indicated doubt as to his responsibility, sometimes stating that the jury would ultimately determine the issue, the record reveals that despite his ambivalence he finally made the decision before the case was submitted to the jury. At the close of both the Government's case and the defendants' case, he denied defendants' motions to exclude certain extra-judicial statements received subject to connection. He further indicated that he himself had made the determination by striking as unconnected certain conditionally admitted statements and by the fact that he did not instruct the jury that it was to make the determination or to consider certain evidence only if it preliminarily decided that a connection had been established.

There is no merit to defendant's further contentions that the trial court committed error in characterizing as "collateral" certain cross-examination of Palmer aimed at his credibility and in restricting cross-examination of both Conroy and Palmer. Defendants' counsel were afforded the opportunity, of which they made extensive use, to engage in broad and exhaustive cross-examination of both witnesses. Their cross-examination, for instance, covers 688 pages of the transcript as against 461 pages devoted to the direct examination. A great deal of impeachment matter was elicited, which enabled defense counsel in their summations to argue at length that defendants were the victims of ineptitude on the part of

PMM and Palmer. Judge Cannella properly sustained objections to further exploration into details that could have only gilded the lily.

The trial judge's characterization of credibility as "collateral" represents but a passing reference in the course of examinations of Conroy and Palmer covering more than 1100 transcript pages. Even if this needle in the haystack be dignified as error, it was cured by the judge's later charge in which he fully instructed the jury as to their function in evaluating the testimony of the witnesses and specifically directed their attention to the significance of prior inconsistent statements.

The defendants were accorded a full and fair trial. The judgment of conviction must therefore stand.

APPENDIX B

Opinion of District Court in Sentencing Petitioner

The Court: This defendant was charged with various violations of Title 18 of the United States Code in indictment 67 Criminal 145, which superseded indictment 66 Criminal 595.

The total counts in the indictment under question numbered 43. Before the case started the government moved to sever counts 17 through 24, and that motion was granted. That left this defendant, Eskow, facing 32 counts, namely, 1 through 16, and 25 through 40.

The case took about——

You may sit down, Mr. Eskow; make yourself comfortable. I do not see any need for you to stand up.

(Defendant Eskow sits.)

The Court: The case took about three weeks, as I recall it, of trial days. The charge stemmed from certain activities which commenced, in the language of the indictment, on or about January 1, 1964, and continued up until June 30, 1965.

It appears that this defendant and one Mackensen, the defendants that were tried together in this trial, were respectively the president and the administrative vice president of the Yale Express System.

The government charge was that they unlawfully, wilfully and knowingly did devise a scheme to obtain money by means of false and fraudulent pretenses from a group of eight insurance companies who were solicited to purchase collectively $2,350,000 of Yale's promissory notes, and that they were induced to do it on false and fraudu-

lent representations made by the defendants that the company was financially sound.

At the time the loan was granted on September 30, 1964, this defendant and Mackensen certified the financial statements for the year ending 1963, and for the six-month period ending June 30, 1964, and said that they were accurate and knew of no material change in the financial condition of Yale.

In addition, they promised that on September 30th they would furnish the insurance companies with an accurate financial statement every three-month period after June 30, 1964. Afterwards they did serve some statements, one approximately November 12, 1964, and that they knew that those statements which they furnished pursuant to such loan agreement were false and fraudulent.

The question of mailing was not in serious dispute. The various organizations involved indicated that they received the material and information through the mails.

Essentially the government's charge was that the false financial statements were issued through the efforts of Mackensen, who caused improper entries to be recorded in the Yale books and caused proper entries to be omitted from the books in order to fraudulently conceal the true state of affairs.

The government charges that this defendant as president of the firm was aware of these inaccuracies and the resulting effects of these inaccuracies. He was not charged with actually falsifying any of the records on his own.

I see no great need to go into the details of the case. I will simply say in passing that the issues which were raised were highlighted during the course of the charge,

and although I do not mention all of them, essentially as far as Eskow was concerned, what he says was that there never was any criminal intent in his mind and that when he saw the company, which should have been making a profit—by just simple arithmetic, you know, you had two million dollars profit from Republic and two million dollars profit from Yale, that should be four million dollars.

Instead of that, it was reduced to a lower amount, that he relied upon the information that he was receiving from his accounting section, and also when he thought there was something wrong that he brought in one of the best companies that he knew of in this area of trucking CPA's work, Peat, Marwick & Mitchell—at that time, of course, he thought they were the best and he spent a lot of money, $150,000 or so, to find out just what was going wrong and where was the profit and why shouldn't there be a profit. He was particularly concerned with the fact that in one period that there was only a profit of around $300,000 when there should have been a million and a half, so he was quite concerned. He spent time and effort and money in trying to find out why this wonderful merger which should have resulted in great profits did not occur.

He claims that he was never told and he did not know that the records were false and he made a point that when the statement was forwarded for the loan that at that particular time he could not know that the statements were false and he did not know that they were false, and as a matter of fact in talking to Conroy he thought that Conroy had told him that for this particular period preceding it the profits were going up again and that in his opinion the statements were not false.

He also indicated to Conroy, "Look, do you have any figures, even if it shows a million and a half or any fantastic

amount of a loss, we will print them, if that is what you say it is," and he said that he relied on Conroy's statement saying, "No, our figures are not good. We cannot depend on them," and that is why by a consensus of a group of people that were present, including Mackensen, himself and Conroy, a figure was printed of around $770,000.

The amounts that I am mentioning here are out of my memory and if I am off it is because of a lack of memory on it, but that is my recollection.

Now without going into detail in these areas, as I have indicated, I highlighted these particular very, very sharp issues of fact for the jury. I think the jury understood very well what the issues were. The jury made a finding here and the Court, of course, is bound by the finding of the jury.

The company went into reorganization, into bankruptcy, and Peat, Marwick & Mitchell finally made a re-audit for 1963 which showed instead of a profit of $1,800,000, that the company suffered a loss of $1,700,000—a downward adjustment of $3,500,000.

The audit for 1964 shows that the company had lost in excess of five million dollars.

Since the company has been in reorganization, the trustee has availed himself of the services of Mr. Eskow, with the permission of the Court—the case, as I understand it, being under Judge Tyler's aegis at this time, in that aspect of it, and I think he is still, unless I am mistaken, operating under the trustee, and that he is handling the affairs of Yale under the direction of Mr. Nogg, the trustee.

He is 44 years old. He is married and has six dependents.

Appendix B

As I indicated, the jury found him guilty of counts 1 through 16, inclusive, and counts 25 through 40, inclusive.

In speaking of punishment, as I understand it—and I wish the lawyers would correct me if I am wrong—under the sections involved it is $1000 and/or five years on each of the counts on which he was found guilty.

Since everyone is nodding in the affirmative, I assume that that is correct.

The defendant, of course, has consistently denied his guilt. Of course I heard him on the witness stand and I heard his background. In addition, he has prepared a five-page typewritten report for the probation officer, and they have summarized it.

He categorically denied knowing the figures incorporated in the financial statement were false, and he gave a history of the growth of the company which really is a Horatio Alger history.

It is just another example of how under the American enterprise system a little fellow can become a big fellow.

And this Yale Express did do just that. It was a family-owned corporation up until 1960 when it went public. It was at that time that Peat, Marwick & Mitchell were hired so that they could certify the years 1955 though 1959.

They later purchased Republic Carloading, and this is where the figures come in of two million dollars and two million dollars. Apparently the companies were making two million dollars each and they figured together they should be making four million dollars, or maybe more, because they could charge off expenses as against each other and therefore result in greater profits.

Appendix B

Mr. Eskow also indicated that he did everything he could to avoid this. He hired a new comptroller, a Donald Palmer, who had previously been with Peat, Marwick & Mitchell, and he relied on this comptroller. The comptroller apparently did discover some $438,000 in bills which had been paid but had not been entered on the books.

It is interesting to note this defendant's reaction to that. His immediate reaction was that he wanted to go to the district attorney because he thought that somebody had been stealing the money.

He talked to his counsel, who I just saw walk into the room, Mr. Halperin. He said, "Look, we have to investigate this and find out what this is all about."

It turned out that there were hidden bills, and that actually nobody stole anything and that no fraud was uncovered, and so this is at the point where he brought in Peat, Marwick & Mitchell to find out how, just how to charge their expenses so that there would be a better system and in effect jack up the whole operation and find out why these profits were not coming in. Apparently he felt that Peat, Marwick & Mitchell were bobbling him, in effect, because every time he asked for information they would say "Soon" or "Next week," or something else, and when he asked Conroy about this figure he told him they were infirm, incomplete and inaccurate and therefore he would use the figures of Mackensen and he would stake his professional reputation on them.

And he thought that is what should be done because, according to his historical knowledge of the company, there should be a profit and that this was a reasonable figure.

He is married and he has four children; residing in Great Neck, New York, a very comfortable house—as the report puts it—non-ostentatious but tasteful.

Appendix B

He estimated the value of the house, or rather it is insured, together with the furniture, for about $200,000. He figures that the house is worth about $100,000, and also the household goods about $50,000, and the carrying charges are close to $500 a month.

I remember his background because he testified about the fact that he went to high school and did take some college work, and did do some lecturing work later on.

He is of Jewish persuasion and follows his religion.

His health condition is good.

The report in the probation report says that he is rather intelligent, an articulate individual, and I think after hearing him on the stand he has a fancy for the parable or the allegory.

I remember certain of his phrases:

"I thought this company had a cold and it turned out to be a cancer," and other picturesque language.

He is very expressive and is able to make himself understood quite well. He is really excited about this and I can imagine that he would be—some of his language from his statement to the probation officer, for example he said that he "almost reached the summit of the Yale Mountain"—here again is this picturesque language, and then he goes on to some other statement, to conclude, "I will not take a single step backwards until I have proven to the whole world that I have been the victim of the incomprehensible and outrageous miscarriage of justice.

"I don't minimize the size and scope of this new obstacle, but it is not an impossible dream nor an unreachable sky. My faith in American jurisprudence has not

been destroyed. A horrendous mistake has been made, but courage, determination and lots of''——

I am sorry, Mr. Burstein, after all, he said this and I do not want to take any thunder from your statement—you can improve on this—''A horrendous mistake has been made, but courage, determination and lots of sweat can force the truth to heal the ruptures that lies, half-truths and understandable confusion have wrought.''

He has never been convicted of a crime, as the records disclose.

He has been employed by Yale for many years—1938. He has the title of vice-president. He held the title of vice-president at a salary of $30,000 a year. For the previous ten years he held the title of president and director of the company and received $60,000 a year.

He has pride in the company, and there is a great feeling on his part that this is the kind of operation that he is doing because of pride.

He served in the United States Army for about three years, with an honorable discharge as a staff sergeant. He had 22 months of foreign service in Alaska.

There is a financial situation described in the report. Since it is taken from him I am sure he is aware of what that is.

He has in his own name $71,285. This includes $10,215 in a commercial account, and $420 in a savings account.

In addition, he holds stock valued at $56,650, and has some personal jewelry worth some $4000.

He lists his personal liabilities as $171,000.

Appendix B

He holds 22,145 shares of Yale common stock. Of course the current market price of that, according to this report, is $2.50 a share, and although the stock is worth around $55,000, it is not convertible to cash at this time.

He also owns some other stock that apparently is not convertible either, and he also owns some other "swap" privileges for which he exchanged Yale stock for in 1961.

His assets are probably worth about $636,000, according to this report.

There is also a financial statement concerning his wife which covers the years 1965, 1966 and 1967.

The probation report from which I have more or less been reading throughout contains some ten pages, and it seems to me to be very thorough and well thought out.

In addition to that, I have a number of other documents here, some of which are slightly humorous in the sense in which I am performing this function today—I don't mean humorous "Ha-ha," but if people want to help somebody it seems to me instead of sending this type of letter they would be better off to send none at all. I am not going to be affected by this because I have been doing this too many years to worry about what somebody thinks about what I am doing or indicating some thought about me, so it is funny.

These are a group of petitions from Yale employees from all over the country—actually all the offices that he comes to, and one starts off, just to give you an example of what I am talking about:

"The people of the Providence terminal feel the decision given Mr. Gerald Eskow was unfair and unjust."

And then, of course, it goes on to say that there is going to be an appeal and they hope that everything will come out all right and that he will win.

These were sent, in my opinion—not to be directed to me, and why they were really sent to me I don't know. I think they were essentially sent to Mr. Nogg to try to influence Mr. Nogg to make an application to the Court to keep him on.

But, as I say, I am not going to pay any attention to these random remarks by these petitioners indicating what they thought about it, but I do take cognizance of the fact that they—and there are hundreds of them—had his interest enough at heart to sit down and sign a petition, indicating that they want to help him.

I also have some individual letters here from the lawyer for the firm, Mr. Halperin, the transport people in California who know him for twenty years—no, this is in connection with Mr. Mackensen—I will hold that over. These involve Mr. Mackensen.

That concludes my remarks concerning what I know about the case and what the charges were and the other aspects.

I will hear you, Mr. Burstein.

* * *

The Court: Mr. Fawer, this case is a very hard case for a Judge. At the outset I want to compliment the lawyers—I did this when it went to the jury, but, very frankly, I have never seen in the twenty years that it has been my privilege to be a Judge, as hard a fought case as this one but with essential fairness on both sides.

Appendix B

There was never any letdown either way. I said to the jury in part, when I charged them, that we are not trying the lawyers, we are not trying the ability of the lawyer to project himself. Nevertheless many times this does happen.

I want to say that Mr. Fawer's presentation of this case was in my opinion a masterpiece, with the background that he had in this case, I would say that there isn't an official nor an employee of the Yale Trucking Company that knew more about their books and records than he did, and the incident during the course of the trial when he immediately picked up the document—that document which was intended to be conveyed to the jury, which was devastating—his manner of handling that and the cross-examination on that particular area was a masterpiece that I think should be included in some of these books that the trial lawyers put out.

I can say no less for Mr. Burstein, who knows more about the company than the company officials.

But certainly there is a limit in the area of the mathematics involved and the accountancy involved in the area, and certainly you made a great effort to bring down the language to the issues that were involved in the case, which essentially were, as far as I was concerned, No. 1, that there wasn't any showing that anything was wrong; and,

No. 2, assuming that there was a showing that there was anything wrong, that Eskow knew nothing about it, and I think you made a masterful presentation to the jury.

The jury itself had the unhappy task of determining where they felt truth lay. Unfortunately for Eskow the

jury has made a determination, and I am bound by that determination. I must proceed with that as a basic element.

I am quite disturbed, though—I think the accolades which have been heaped upon Mr. Morgenthau in this district in the recent weeks in the change of this administration, namely, his assiduous pursuit of crime in areas which were neglected for many years, are exampled in this case.

This is the kind of case that is very, very hard to bring in to court and to have a jury understand, and it is a very important area in which the public is entitled to be protected. Private companies are more or less on their own, and although there are certain restricted areas, they do not compare to a company which goes public and in which the public has an interest.

Skullduggery in these places cannot be countenanced either by public officials, by the courts, or by anyone else, and it must be sought out and it must be stamped out, and an example must be made—there is no question about that.

This case, however, in particular, is of great concern to the Court. The thoughts that keep running around in the back of the Court's mind are that there isn't a single solitary witness or party involved in this case that couldn't have been and shouldn't have been and wasn't a coconspirator, including the insurance companies, who were so stupid as to go out and lend money without making any investigation whatsoever, relying upon people that they never saw or spoke to except on the telephone, investing company money, insurance company money, in the sums of $200,000, $300,000, $400,000 because Joe Blow,

some unknown person to them, called up and said, "Look, if you have some money to invest, put it in here."

Obviously it seems to me that something ought to be done in these areas, to find out what these insurance companies are doing to protect their own investment because in this particular case they could have looked from today until tomorrow and they never would have found anything because you cannot believe from looking at the report that it was false.

But the fact of the matter is that many of them did nothing at all about it, and the ones that dealt with Ecklebarner up in Chicago, depended upon him, except that he had made investments in other areas before the oncoming of Peat, Marwick & Mitchell.

I do not even want to characterize this because, as I understand it, there is still litigation in this area, and it is not my judgment that is going to count for very much there, but it certainly seems to me that for a man like Conroy to get up and say that "We submitted this report," and that the man should know in September of 1964 that this was false, and then they themselves did nothing about it. Here is the company that certified the report, certified the report to the public in September, 1964, when they made the loan, and they continued and left their certification there.

What kind of ignorance is this? Why aren't they in the case and why shouldn't they be part of the defendants and to defend their conduct in this course of action?

The fellow that went to Mackensen and said to him:

"Say, these bills are here. What are you going to do with them?"—then he gives him a song and a dance, and the jury believed that he did; he goes back and he does a

lot of phony business because Mackensen said to him "Do it."

That fellow is just as much at fault as anybody in this case.

The point I am making is, as it turns out now, Eskow and Mackensen were the whipping boys when everybody is involved in this case. But they are the only two that wound up as defendants in this case.

That does not excuse them—it does not excuse them at all but, in any event, it lends food to the Court's thought of why essentially should there be only a whipping boy. If we are going to do a job in the field of helping the public and having the public protected, why don't we protect them against everybody who is involved, and not only against a certain selected few.

I admire the United States Attorney, Mr. Fawer in particular, for not doing something which ever since I was an Assistant here in 1940, it has been my knowledge that the Supreme Court and other appellate courts below it have always criticized the law of conspiracy.

Mr. Fawer could have come in here with a terrific conspiracy charge, and I remember when I was an assistant here there was a case that I tried—United States vs. Bonsal, 88 defendants. How do you try a case with 88 defendants?

There is one fellow that is sitting there—maybe 20 of them sitting there during a trial of six or seven months and never hear his name mentioned except one day for 15 minutes, and there he is all this time.

Mr. Fawer did not do that. He charged these men essentially with substantive counts, 32 substantive counts here.

I admire him in taking that position because it is certainly easier for the prosecutor to come in with a conspiracy count than it is to come in and try to prove substantive counts.

So I do not find fault in this area but I do think there is something to be said about the fact that they are essentially whipping boys in this area.

Under the circumstances the Court feels that some consideration should be given to Eskow—I cannot forgive him because I do not have the power to forgive him. I am not the Lord. There is a Supreme Being that probably has a right to give it.

The jury having found him guilty, I must presume that he is guilty.

Therefore, under the circumstances, if you will arise, Mr. Eskow——

(Defendant Eskow stands.)

The Court: —it is adjudged that upon each of counts 1 through 16, inclusive, with the exception of count 6, which at this time the Court dismisses because it is the Court's recollection that in reference to count 6 there was one mailing which involved count 5 and count 6, the Ecklebarner matter——

Mr. Fawer: That is correct.

The Court: —and since there must be an individual mailing for each count, I dismiss count 6.

I therefore will sentence him on counts 1 through 16 inclusive, except count 6.

On counts 25 through 40, inclusive, a committed fine of $500 on each count, a total of $15,500.

These fines, as I have indicated, are committed fines.

In addition, the defendant Eskow is sentenced to a year on each of the counts 1 through 16 inclusive except as to count 6, and counts 25 to 40, inclusive, and those sentences are to run concurrently.

However, sentence is suspended and the defendant is placed upon probation for a period of one year.

The Probation Department is directed to make a recommendation at any time prior to the termination of the year for unsupervised probation. He will be supervised until such time during the course of the year that the probation office feels that he should be unsupervised.

The probation is subject to the terms and conditions which are on file in the probation office and will be made known to the defendant immediately following the sentence.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1509

GERALD W. ESKOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals affirming petitioner's conviction for mail fraud was entered on February 27, 1970. The petition for a writ of certiorari, filed on May 1, 1970, is out of time under Rule 22–2 of the Rules of the Court.

In any event, petitioner's contentions, which essentially challenge the sufficiency of the evidence, are fully discussed in the opinion of the court of appeals (Pet. App. 1a–19a) and do not warrant further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

385-890—70

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